

## **ENVIRONMENTAL QUALITY BOARD STAFF RESPONSE TO COMMENTS**

**SEPTEMBER 24, 2003**

The Environmental Quality Board staff has considered the oral comments that were made at the public hearing on September 24, 2003, and the written comments that have been filed in this proceeding since the hearing, which include comments from the Sierra Club (September 17), the Minnesota Center for Environmental Advocacy (September 23), the Department of Commerce (September 24), and the Public Utilities Commission (September 24). We have also considered the written comments of Laura and John Reinhardt, dated September 4, which were introduced at the hearing.

The staff supports a number changes in the proposed language. Most of these changes are shown in the document the staff introduced at the hearing – Exhibit 50. The rationale for these changes is discussed in Exhibit 51. There are a few additional changes the staff believes are appropriate in response to comments that were filed, and these are discussed below. In some instances the staff does not support a suggestion made by a commenter, and the reasons for not supporting these changes are also described below.

### **4410.7010. APPLICABILITY AND SCOPE.**

The staff supports the changes shown in Exhibit 50 for the reasons explained in Exhibit 51. No person objected to these changes.

### **4410.7015. DEFINITIONS.**

No changes are recommended from the proposed language. No person has suggested any changes.

### **4410.7020. ENVIRONMENTAL REVIEW BEFORE PUBLIC UTILITIES COMMISSION.**

No changes recommended.

### **4410.7025. COMMENCEMENT OF ENVIRONMENTAL REVIEW.**

#### **Subp. 1. Certificate of need application.**

The Sierra Club has suggested that language be added to this rule to require the applicant for a certificate of need to identify the location of any sites or routes that are under consideration by the applicant. The staff does not support this change.

These 4410 rules are not intended to establish requirements for what must be included in a certificate of need application or a transmission projects report. It is common for an applicant to not have determined the preferred location for a project at the time the need

decision is initiated, and it is inappropriate to require an applicant to identify a specific site or route for the project when the Public Utilities Commission does not require it.

The rules of the Public Utilities Commission require an applicant to identify “to the fullest extent known to the applicant, the anticipated areas where the proposed facility [a power plant] could be located,” Minn. Rules part 7849.0250, item A(5), or to provide “a list of all counties reasonably likely to be affected by construction and operation of the proposed [transmission] line.” Minn. Rules part 7849.0260, item A(6). This is the information that will be included as part of the application.

The reason the Sierra Club wants potential sites and routes to be identified is so that persons who own property or live near the project can be given notice of the application. The staff supports the idea of providing notice to those persons who will be most affected by a proposed project, and certain changes are suggested for part 7030 to give notice when affected landowners and residents can be identified, but the staff is reluctant to require an applicant to provide data that it may not have and is not required to submit to the PUC.

#### **Subp. 2. Transmission projects report.**

The Sierra Club also suggests that language be added to this subpart to require an applicant to identify any potential routes under consideration by the applicant. For the same reasons spelled out above, the EQB staff does not support this change. However, the staff does support providing notice to those persons who could be directly affected by a new project when the applicant has identified a likely location for the project.

#### **4410.7030. PROCESS FOR PREPARATION OF ENVIRONMENTAL REPORT.**

A number of commenters expressed concern about providing notice of a new project to the public, and in particular to those persons who would be most directly affected by a new power plant or transmission line. Subpart 1 of this rule identifies the persons who will be given notice by the EQB of a proposed project and of the preparation of an environmental report by the EQB. The staff suggests a couple of changes in subpart 1 to clarify and expand the notice requirements.

The first change the staff would recommend is in subpart 1, item D. The staff included this language in Exhibit 50 as a change it would support. Item D would read as follows:

**Subp. 1. Notice to interested persons.** . . . Notice must be mailed to the following persons:

D. those persons who are required to be given notice of the certificate of need application or the transmission projects report under rules of the Public Utilities Commission;

The staff suggests that item D be amended to require the EQB to give notice to those persons who are required to be given notice of the certificate of need application or the transmission projects report under the PUC rules.

Nobody disagrees with the idea of using PUC service lists to notify people of the filing of a certificate of need application or transmission projects report, but a question has arisen over how those PUC requirements will be determined. The PUC recently adopted rules for giving notice of transmission projects reports, Minn. Rules part 7848.1900, but the rules for giving notice of certificate of need applications are in the process of being amended. Minn. Rules chapter 7849. At the hearing, Judge Klein raised the issue of whether the EQB can incorporate by reference into its rules the PUC's existing provisions in chapter 7849, and then rely on amended language to establish notice requirements in the future.

Judge Klein made a reference to a Minnesota Supreme Court decision holding that a subsequent change in a federal statute incorporated into a state statute did not result in the state statute being changed automatically. That case is *Wallace v. Commissioner of Taxation*, 184 N.W.2d 588 (Minn. 1971). In *Wallace* the Supreme Court held that taxpayers were entitled to an exemption granted under state law even though federal law had been changed to disallow the exemption.

However, in a more recent case, *Minnesota Recipients Alliance v. Noot*, 313 N.W.2d 584, 586, (Minn. 1981), involving a question of eligibility for AFDC grants, the Supreme Court relied on an exception recognized in *Wallace* that where there is a need for uniformity between the state and federal law, it is permissible to allow state law to change when federal law changes. Also, the Court found that the Legislature had recognized that subsequent changes in one law can be incorporated into another. Minn. Stat. § 645.31 subd. 2 provides:

Subd. 2. Adoption of law by reference. When an act adopts the provisions of another law by reference it also adopts by reference any subsequent amendments of such other law, except where there is clear legislative intention to the contrary.

In this case, while there is not a need to be consistent with federal law, it makes sense to make the EQB rules consistent with the PUC rules regarding who gets notice of a pending certificate of need application. Moreover, the requirement under review here is one that is imposed on the EQB. The EQB will certainly want to give notice to those persons the PUC has determined are the appropriate people to get notice of a pending certificate of need application.

There is nothing in this language that would interfere with the PUC's authority to amend its rules at anytime that it deemed amendment to be appropriate.

For all these reasons, it makes good sense to adopt the language suggested for item D, making reference to the PUC rules to establish who must be given notice.

The Sierra Club would like to see language added to the rules to require that notice be given to landowners adjacent to proposed projects when the applicant has identified preferred or potential sites or routes. As discussed above with regard to part 7025, applicants often don't know where they intend to build the project at the time a need determination is being sought. However, in those instances where an applicant has identified the locations under consideration for a proposed project, the staff does not oppose giving notice to landowners near the proposed site or route. The staff would support the addition of a new item F. as shown below.

F. those persons who own property adjacent to any site or within any route identified by the applicant as a preferred location for the project or as a site or route under serious consideration by the applicant if such sites or routes are known to the applicant.

This new language would require the EQB to give notice to affected landowners in those situations where they can be readily identified because the applicant has identified the site or route where it would like to locate the project. In those instances where several alternative locations are under serious consideration, the EQB would give notice to all potentially affected landowners. The qualifier "serious" is a subjective term, but it is reasonable to put some boundaries on identifying locations where the project might be located. The difficulty arises when the applicant for a certificate of need has not finalized its plans for the location of the power plant or transmission line at the time a certification of need is applied for. It is unreasonable to expect the EQB to give notice to every landowner in a county where a transmission line might be located, or to every landowner who might be affected by a power plant to be located somewhere in a large geographic area.

As explained earlier, there is no obligation that an applicant identify the preferred or possible sites, beyond what the PUC rules require, but in those instances where a site or route has been identified, the EQB will determine who the landowners are and provide notice. It would behoove the applicant to assist in the identification of affected landowners to help expedite the giving of the notice. In determining who the adjacent landowners are, the EQB will rely on information available through the county auditor or county treasurer, the same as it does under the Power Plant Siting rules. Minn. Rules part 4400.1350, subp. 2.C.

In sum, part 7030, with the changes described here, should ensure that notice is given to those persons who are most affected by a proposed project. In addition to these subpart 1 direct mail requirements, subpart 3 requires publication in a local newspaper. Also, posting the application and the notice on the EQB webpage will help provide prompt notice of pending projects and upcoming public meetings. Finally, there are other avenues available to learn about proposed projects. With regard to the transmission planning process, the new rules promulgated this year by the Public Utilities Commission, Minn. Rules ch. 7848, establish requirements for utilities to hold public meetings and advise the public of potential transmission projects. The date for the transmission projects report is always the same – November 1 of the odd-numbered years – so the public can anticipate when it might learn of these projects. The resource planning process required of utilities under Minn. Stat. §216B.2422 is another forum in which the public can learn of possible projects.

### **Subp. 2. Content of notice.**

A number of changes in subpart 2 were recommended in Exhibit 50. The staff continues to support those changes. In addition, the staff supports the addition of a new item G. to respond to a suggestion raised by the Reinhardts.

The Reinhardts suggested that the notice describe the manner in which a person can add his or her name to the project contact list to get future notices regarding the project. That's a good suggestion, and the staff recommends that a new item G. be added to subpart 2 as follows:

G. a statement describing the manner in which an interested person can add his or her name to the mailing list for future notices.

The Reinhardts also suggest that the term "pertinent information" be defined in item E. It is a difficult term to define because what is pertinent may change with each project. If the EQB had to identify by rule what is available for review, the list would have to be quite narrow, perhaps simply a reference to the certificate of need application or the transmission projects report, since that is all that can be identified in advance with certainty. The staff believes it is preferable to simply indicate that the notice that is provided will identify where an interested person may review information about the project, regardless of what that is.

### **Subp. 3. Public meeting.**

Throughout the rules the phrase "transmission planning report" should be changed to "transmission projects report." The staff failed to catch a reference in this subpart to the transmission projects report when it submitted its recommended changes in Exhibit 50. There are a couple of other references in other parts of the rule that should be corrected as well, in part 7030, subparts 1, 4, and 9, and in part 7070.

### **Subp. 4. Conduct of public meeting.**

The staff supports the change described in Exhibit 50. Also, this is another place where "transmission planning report" should be changed to "transmission projects report."

### **Subp. 6. Alternatives and impacts.**

The EQB staff agrees with the Minnesota Center for Environmental Advocacy and the Sierra Club and the Department of Commerce that it would be appropriate to rely on language in the existing environmental review rules, Minn. Rules part 4410.2300, item G, to determine what suggested alternatives need not be addressed in the environmental report. The staff proposed language to do so in Exhibit 50.

The Minnesota Center for Environmental Advocacy pointed out in its comments that the proposed sentence in this part addressing when the Chair would include an alternative or impact should be struck. The staff agrees, and the language below shows the sentence

deleted. The final staff proposal for this part reads as follows, with some minor editing in the new sentence from what was proposed in Exhibit 50 simply for clarity and grammatical reasons:

**Subp. 6. Alternatives and impacts.** A person desiring that a particular alternative to the proposed project or a possible adverse impact of the project be considered in the environmental report shall identify the alternative or impact to be included, provide an explanation of why the alternative or impact should be included in the environmental report, and submit all supporting information the person wants the chair to consider. The chair shall provide the applicant with an opportunity to respond to each request that is filed. **The chair shall include the alternative or impact in the environmental report only if the chair determines that the evaluation will assist the PUC in its decision on the certificate of need application or HVTL certification request.** The chair shall include in the environmental report any alternative or impact identified by the PUC for inclusion. The chair may exclude an alternative from analysis if it does not meet the underlying need for or purpose of the project, it would likely not have any significant environmental benefit compared to the project as proposed, or another alternative that will be analyzed would likely have similar environmental benefits but substantially less adverse economic, employment, or sociological impacts than the suggested alternative.

**Subp. 7. Chair decision.**

The staff supports the change shown in Exhibit 50 for this subpart.

**Subp. 8. Notice of decision.**

The staff supports the change shown in Exhibit 50 for this subpart, recognizing the right of any person to ask the Chair to bring the matter of the scope of the environmental report to the Board for decision. The rationale is explained in Exhibit 51.

Some commenters pointed out that it was important for interested persons to register their names with the EQB so they will get notice of the Chair's scoping decision. The change suggested for part 7030, subpart 3, describing how persons can get on the mailing list, will help ensure that interested persons are given notice of the Chair's decision.

**Subp. 9. Time frame for completion of environmental report.**

The staff supports the change shown in Exhibit 50 for this subpart. There is also a correction of the phrase "transmission planning report" to "transmission projects report" in this subpart.

## **4410.7035. CONTENT OF ENVIRONMENTAL REPORT.**

### **Subp. 1. Content of environmental report.**

The Sierra Club, the Reinhardts, and the Minnesota Center for Environmental Advocacy want subpart 1 to include a requirement that the EQB consider the alternative of upgrading existing transmission lines or power plants. PUC rules require that an applicant for a certificate of need consider the possibility of upgrading existing facilities. Minn. Rules part 7849.0260, item B.(3), provides, with regard to information about alternatives, that the applicant address “upgrading of existing transmission lines or existing generating facilities.” Minn. Rules part 7849.0250, item B.(2), requires consideration of “increased efficiency of existing facilities, including transmission lines.” The staff would support the addition of such language to item B in subpart 1 so that it would read as follows:

B. A general description of the alternatives to the proposed project that are addressed. Alternatives shall include the no-build alternative, demand side management, purchased power, facilities of a different size or using a different energy source than the source proposed by the applicant, upgrading of existing facilities, generation rather than transmission if a high voltage transmission line is proposed, transmission rather than generation if a large electric power generating plant is proposed, use of renewable energy sources, and those alternatives identified by the chair.

The Reinhardts do not like the choice of words in item C. The Reinhardts object that the term “human and environmental impacts” is not broad enough and they prefer that a phrase such as “economic, employment and environmental” be used instead.

The staff has explained that the phrase “human and environmental impacts” is broad enough to include everything that is relevant to an evaluation of a proposed project. The Reinhardts are concerned that the rule would eliminate an analysis of economic, employment, and sociological impacts.” That is not so. The scope of the environmental report will be determined at the start of the process with input from interested persons. Economic, employment, and sociological impacts can be properly included in the scope of the environmental report. The change suggested by the Reinhardts is not necessary.

### **Subp. 2. Impacts of power plants.**

The staff supports the changes shown in Exhibit 50 for this subpart.

Russell Pangerl, a Dakota County resident, testified at the hearing that it would be helpful to define “hazardous air pollutant” in item B. The staff believes that it is preferable to identify hazardous air pollutants when the scoping of the environmental report is done at the start of the process. That is the time and the method for identifying any hazardous air pollutants of concern. In identifying those hazardous air pollutants that must be addressed in the environmental report, the EQB would consider the 189 chemicals listed as hazardous air

pollutants under the federal Clean Air Act. 42 U.S.C. 7412(b). However, it is not necessary or appropriate to attempt to define the term in the rule.

Mr. Pangerl also suggested that the EQB include in the environmental report on proposed power plants the identity of the source of any water required by the facility. That is a reasonable suggestion provided the applicant has identified preferred or possible locations for the power plant. The source of the water for a new power plant will always be a matter that is analyzed in the site specific environmental review that is conducted under chapter 4400 when the applicant applies to the EQB for a site permit. In any event, the staff would not object to the following language in Item G:

G. the anticipated amount of water that will be appropriated to operate the plant, and the source of the water if the applicant has identified a preferred site;

Finally, Mr. Pangerl questioned how noise impacts would be measured. The EQB staff anticipates that the requirements of the Pollution Control Agency noise rules, Minn. Rules chapter 7030, will be applied in determining projected noise impacts of a proposed project.

#### **4410.7040. AGENCY ASSISTANCE**

There are no changes recommended for this rule.

#### **4410.7045. APPLICANT ASSISTANCE**

Mr. Pangerl suggested that this language be modified to require an applicant to provide any data that is requested unless it is unreasonable to do so. The staff does not believe that this change is necessary. The language already requires the applicant to provide data or information to which it has reasonable access. Moreover, it is in the best interests of the applicant to promptly provide any information that it has that will aid in the expeditious completion of the environmental report.

#### **4410.7050. ENVIRONMENTAL REPORT TO ACCOMPANY PROJECT.**

##### **Subp. 1. PUC decision.**

The Sierra Club and the Reinhardts and others would like to see language added to the rule to require the Environmental Quality Board to respond in writing to any substantive comments that are submitted on the environmental report. The staff has consistently explained that with a statutory deadline of six months to act on a certificate of need application, and a seven month period to act on a certification request as part of the transmission projects report, there simply isn't time to be able to provide both a draft environmental report and a final report responding to comments.



## **Subp. 2. Completeness of environmental report.**

What the EQB envisions is that once the environmental report is available, the EQB staff will be available at the PUC hearing to answer questions about the information in the report and to respond to comments and questions at the hearing. Anything that is introduced into the administrative record at the PUC hearing will be considered by the Commission when it makes its decision on need. The Public Utilities Commission emphasized this point in its written comments.

Subpart 2 provides that the Public Utilities Commission can direct the EQB to supplement the environmental report if the Commission determines that it is necessary to do so. All parties are interested in compiling a complete record for the PUC's consideration. If the EQB has failed to address a particular alternative or impact, or has done an incomplete job of analyzing an alternative or impact, and the PUC believes that such information is necessary for it to make a decision, the PUC can direct the EQB to supplement the environmental report.

Rather than require by rule that the EQB respond in writing to all substantive comments, with a corresponding delay in the proceeding, it seems reasonable to recognize that the PUC maintains the option of requiring a supplement when the administrative record is incomplete in some fashion. The staff does not support adding any language to the rules requiring the EQB to respond in writing to comments.

Interestingly, the process established in these rules is identical to the process the EQB follows when it conducts environmental review at the site or route permitting stage on a project that qualifies for alternative review under the Power Plant Siting Act. Minn. Stat. § 116C.575. Under this alternative form of review, the EQB has only six months to act on a permit request (as opposed to a full year under the full process when an environmental impact statement is required).

Minn. Rules part 4400.2850, subp. 3, which applies to the alternative permitting process, provides:

Subp. 3. Environmental assessment. Interested persons may comment upon the environmental assessment at the public hearing. Comments on the environmental assessment shall become part of the record in the proceeding but the board shall not be required to revise or supplement the environmental assessment document.

The EQB staff believes that as long as the administrative record is complete, decisionmakers will have the information they need to make sound decisions regarding both need and location of new large energy facilities.

## **4410.7060. JOINT PROCEEDING.**

The staff supports the changes shown in Exhibit 50 for this subpart.

**4410.7065. ALTERNATIVE FORM OF REVIEW**

There are no changes suggested for this rule.

**4410.7070. COSTS OF PREPARATION OF ENVIRONMENTAL REPORT.**

The only change here is to change “transmission planning report” to “transmission projects report” in subpart 1.